LIMITS TO FREEDOM OF EXPRESSION?

CONSIDERATIONS ARISING FROM THE DANISH CARTOONS AFFAIR

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INTRODUCTION

In September 2005 a Danish newspaper *Jyllands Posten* published a group of cartoons containing satirical depictions of the Prophet Mahommed. As Islamic communities throughout the world gradually became aware of the publication of the cartoons there were many passionate expressions of distress and anger, largely on two grounds: first that Muslim belief does not accept pictorial representations of the Prophet and second that the cartoons associated the Prophet, and Muslims generally, with terrorism. Public demonstrations, some of them violent and resulting in loss of life, and protests directed mainly at the newspaper and the Danish government followed, whilst the cartoons were reprinted by a number of newspapers in other countries in solidarity with the original publishers. The complex of issues contained within this case is obviously of deep concern to librarians for a number of reasons, most notably the commitment of the profession to freedom of expression as a basic value of library and information work, but also because of the global role of libraries in contributing to providing access to the widest possible range of information and ideas for communities whatever their beliefs. IFLA's FAIFE core activity provides a central professional focus for addressing these issues and has called for informed and tolerant contributions to the debate. The present article is intended to respond to that call.

The essence of the debate is a clash between two opposed views of freedom of expression. One, put forward by *Jyllands Posten* and its supporters, is that what occurred was simply an exercise of a right of freedom of expression that is central to the effective working of democratic society. The other, as expressed by the Muslim opponents of the publication of the cartoons, is that there are limits to freedom of expression, and that one of these is the denigration of religion and through that the insulting of the community of religious people. The central concern, then, is the question whether there are limits to freedom of expression: is there anything that cannot be said, or circumstances under which things cannot be said? Following from this there is a cluster of other questions. If freedom of expression does have limits, just how can these limits be defined? Is the giving of offence one of the possible limits to freedom of expression? How can we identify the boundaries of what might legitimately be considered offensive? Is there any kind of right to take offence?

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Finally, what does this suggest for the practice of librarianship? There are a number of ways by which these questions can be addressed, but by setting them in a framework of human rights it is possible to use a language and a way of thinking that is current and widely accepted. It is also the framework explicitly used for the IFLA FAIFE core activity. This article will basically use this approach, but will also introduce some criteria for assessing the danger of offence that may differ somewhat from those offered in other commentaries on the issue.

THE GROUNDS FOR FREEDOM OF EXPRESSION

It is normal in discussion to derive arguments on freedom of expression from the United Nations (1947) Universal Declaration of Human Rights. This contains in its Article 19 the most widely accepted formulation of the right of free expression, which makes a natural starting point for the present discussion. However, it must be remembered that the whole concept of human rights and of any right set out in declarations, conventions, treaties, constitutions and laws is a essentially a distillation of centuries of philosophical discussion and debate. Human rights are not a concept given to mankind from some external source. There is reasoning behind them and they remain open to discussion and reinterpretation. The use of the Universal Declaration as a basis for argument cannot be because it is somehow 'true' but rather because it is the best and most widely accepted statement of human rights. Furthermore, the whole set of rights included in the Declaration provide important perspectives on the discussion of freedom of expression and it is a mistake to discuss what the Universal Declaration says in Article 19 in isolation from these and from informed commentary on human rights generally. The Preamble to the Universal Declaration sets human rights in the context of 'the inherent dignity' as well as 'the equal and inalienable rights of all members of the human family'. This concept of the human dignity applying equally to all is thus intended to pervade the whole of the Universal Declaration.

With that in mind we can turn to what the complete Article 19 says.

> **Universal Declaration of Human Rights, Article 19**
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> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

It is first of all a right to freedom of opinion: an essentially private right. Only after that is it a right to freedom of expression: a more public right. For librarians the key thing is that in setting out a right to 'seek, receive and impart information and ideas' it provides as good a rationale for the practice of librarianship as can be found.

It is also relevant to this debate that the Universal Declaration protects the right to religious faith (actually before it protects freedom of expression).

Universal Declaration of Human Rights, Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Two important things about Article 18 are that this is first of all a right of freedom of thought and conscience that includes religion. It thus protects the views of those who have no religion and who may feel an antipathy to religion. Secondly, in protecting a right to change religion or belief it implicitly protects the right to persuade others to change and confirms that by protecting public manifestations of religion or belief, including teaching. The Universal Declaration thus recognises that it is not merely a right to have beliefs, but to change beliefs and also to seek to persuade others to change their beliefs. Again implicit in this there must be a recognition that the process of persuading others to change will naturally include communication that is critical or even derogatory to an existing belief. Article 18 does not protect beliefs, as such, from negative comment (though respect for human dignity could protect individuals from negative comment on their own particular beliefs).

That said, it is necessary to ask what freedom of expression actually means. Looking for earlier statements of freedom of expression that might help inevitably leads towards the First Amendment to the American Constitution. The eighteenth century was the period in which modern thinking on human rights was worked out, and the First Amendment is a classic eighteenth century statement of the freedom of expression.

First Amendment to the Constitution of the United States of America, 1791

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The First Amendment is quite clearly first and foremost a statement of individual rights and offers protection against the violation of those rights by government, identified here as ‘Congress’. Quoted in full it has elements sometimes forgotten: it rejects an official establishment of any one religion, whilst protecting the practice of all religions. It also protects peaceable assembly and the petitioning of government. These are important statements, but it is the protection of freedom of speech and the freedom of the press that are most frequently cited. Although they might be considered as a single right, they are actually two related rights: the freedom of personal expression, and the freedom of public expression (using the medium of the press, and in modern circumstances all the other media now available). The

distinction is important. The two aspects of expression have different levels of effect and tend to be justified in rather different ways.

Philosophers have sometimes justified the individual right of expression as a minor and innocuous right, but at the same time claims for its power are also common. That two such different views can be held is not surprising if we distinguish between a personal statement made impromptu in the presence of only a few (basic freedom of speech), with a carefully calculated statement put out before a substantial audience or using the media (freedom of the press). The power of the word to bring about, or contribute to, change is presumably indisputable. It is this power that leads to calls for freedom of expression to be used responsibly.

When those who already exercise power also use the word as one of their instruments, the argument for responsibility is persuasive. The philosopher Immanuel Kant, for example, argued that the freedom of expression might need to be controlled and restricted when it came to its use by those in authority (Kant, 1784). The danger of the call for 'responsible' use of freedom of expression when applied to the ordinary citizen is that it can amount to a pressure for self-censorship. Indeed, in systems of government where authority actually requires 'responsible' use, this is essentially a basis for a system of formal censorship. For this reason the fear that there will be calls for responsible use of freedom of expression is a natural one. The editor of *Jyllands Posten* is said to have deliberately chosen to publish the offending cartoons because he believed that the Danish media already practised self-censorship in relation to the country's Muslim community. Subsequently the response to Muslim protest has included strong claims that a climate of self-censorship was the likely result. Nevertheless it is clear that, outside the most extreme libertarian circles, the right to freedom of expression is always seen as subject to certain limits and conditions.

LIMITS TO FREEDOM OF EXPRESSION

Limitations on freedom of expression are made comparatively explicit in the formal agreements on human rights drawn up by governments. The European Convention on Human Rights (1950), for instance takes the wording of the Universal Declaration almost intact into its Article 10, but adds important further statements specifying a number of those limits.

European Convention on Human Rights, Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

These are not the only limitations that might be suggested. They do, however, embody the key areas of concern that states cite when imposing limits on the exercise of freedom of expression. It is also worth noting that national security, territorial integrity and public safety are also the chief basis on which those states that particularly fear what their citizens think and say introduce control of expression, despite formally signing up to the international declarations of human rights.

The identification and definition of limitations to freedom of expression is, as implied above, a dangerous business. Done rashly it threatens to undermine the whole structure. Yet it is a fundamental principle expressed in Article 29 of the Universal Declaration that such limitations do exist. They are expressed in terms of 'duties to the community' and their scope is constrained in general terms by considerations that include respect for the rights of others.

Universal Declaration of Human Rights, Article 29

1. Everyone has duties to the community in which alone the freedom and full development of his own personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare of a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

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If this is in danger of being seen as insufficiently strong on the circumstances in which human rights can be limited, then in the 30th and final Article of the Universal Declaration, the point is made even more directly.

Universal Declaration of Human Rights, Article 30

Nothing in this declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

The second clause of Article 29 calls for the law to be used as the test of what might be invoked as a limitation to the exercise of the rights (including the right of free expression), and Article 30 sets what looks like an absolute limit to the 'destruction' of rights and freedoms. However, this is unlikely to be sufficient to satisfy both parties in disputes over the more difficult aspects of any given right or group of rights, as the Danish cartoons affair amply illustrates. Something more, something more capable of being used as a means of working out a good solution to damaging disputes, is obviously required.

The calculation of what is known as 'proportionality' - the assessment of whether or not an action by authority imposes greater restrictions than those necessary to achieve its proper purposes - offers such a tool. The problem is that whilst anyone can form a personal view of where the proportionality lies in a given clash of laws or rights, it is the courts of law that are likely to be the forum in which a decision is made. Thus, Article 29 places the responsibility in the hands of the legislators and the use of the principle of proportionality relies on the judiciary. Where can ordinary citizens, or indeed ordinary information professionals, who need to work out their own response turn for more specific guidance? A common and appropriate resort in such dilemmas is the harm principle, as set out by Mill (1859). He suggested that the use of freedom of expression could reasonably be limited if it caused harm to others. The idea is usually illustrated by saying that it would be a harmful use of freedom of expression to shout 'Fire!' in a crowded theatre. The attraction of the use of harm as a guiding principle is that harm can quite often be measured: it might involve financial loss or personal injury. However, in this context it is generally taken to mean harm to the rights of others and as such it requires more or less the kind of calculation of proportionality suggested above.

It is clear from recent experience that offence has entered into the list of forms of harm that would need to be taken into the calculation. There has been an increase of cases in which people, usually members of religious groups, protest vehemently that they have suffered offence and that they should be protected from this. Two examples from Britain illustrate the point that this is certainly not confined to the Muslim community. There was a comparatively enormous volume of Christian protests at the TV transmission of *Jerry Springer: The Opera*, in which there was a comic and disrespectful portrayal of Christ. The protests included death threats to the executives who approved the transmission. Street protests by members of the Sikh community in Birmingham at the performance of the play *Behzti* (which had scenes portraying criminal behaviour taking place in a gurdwara) reached such levels that further performances were cancelled because of the risk of harm to people and property. What this shows is that the Danish cartoons affair is not unique in turning attention to the idea that the giving of offence might be considered as a kind of harm in its own right.

A recent attempt to render this coherent is Feinberg (1988)'s offence principle. Recognising that offence can be very deeply felt and that its consequences are potentially extremely damaging (as very directly illustrated by the Danish cartoons protests) Feinberg offers what is effectively a means of modelling offence. The principle suggests that assessment of offence should take into account issues such as the motives of the speaker, the number of people offended, community interests, and the extent to which the material could be avoided. This is, however, after the event. Much the same approach is open to those contemplating making some form of communication that might be considered offensive. Thus individuals with sincerely felt views that they knew would offend some people might still decide that it was necessary to exercise their freedom of expression because their point was too important to keep to themselves. They would need to work out whether they were directing their statements to a minority (which might be vulnerable and sensitive to criticism) or the majority (which might be seen as requiring a shock to its views). They would be encouraged to examine whether what they communicated was likely to damage community interests, perhaps by provoking communal strife or risking

destructive public protest. They could also decide what forums or media would most appropriate (for instance, an academic journal read by a few specialists or a popular newspaper read by many). Used in this way, Feinberg's offence principle offers a way to balance the danger of self-censorship against the risk of giving offence. Whilst it is helpful, the problem remains. How can limitations be applied in any given case without damaging the principle of freedom of expression?

WORKING WITH LIMITATIONS

Even key statements on freedom of expression, such as Article 10 of the European Convention on Human Rights, identify limitations and thus effectively compromise the principle. It is clearly not the recognition of limitations that is the main issue, but the precise application of limitations. What is useful here is to consider the two questions of audience (or readership), on the one hand, and media employed, on the other hand. This is implicit in much of what Feinberg suggests. There is a big difference between communication addressed to an audience consisting of an ordinary individual, a few individuals, or even the general populace, and communication addressed to those who hold power as rulers, elected or unelected, representatives and officials. There is also an appreciable difference between messages put out by individuals on their own responsibility, and messages that originate from officialdom or are circulated by some media organisation.

Taking the question of media first, a speech made on the street (for instance at Speaker's Corner in London, a traditionally tolerated venue for the expression of all kinds of views) a privately printed pamphlet, a letter to a newspaper, or a personal weblog, is one thing. An article or column in a newspaper, a programme broadcast on radio or TV is another. The latter may possibly represent a journalist's deeply felt personal view, but it also represents the editorial policy, whether *laissez faire* or highly directive, of the owners and editors of the medium concerned. It is not entirely sound to claim that the principle that protected the freedom of the press alongside freedom of speech (as in the US First Amendment) applies just as much to a modern newspaper as it did to the eighteenth century newspaper. There is an enormous contrast between a weekly sheet owned, printed and largely written by one person, and the products of a modern media corporation. Many such corporations have global finance, global reach, power over their salaried journalists, and, crucially, very close relationships with governments. Much of what is published via the global media comes from a position of power akin to that wielded by the rulers of states, and the duties to the community set out in Article 29 of the Universal Declaration apply, if possible, more strongly to those who have power than to those who have little or none.

In case this seems to denigrate the role of independent journalists and writers, or independent media, it is important to say that there is no such intention. The courage of such people and their role as keepers of the popular conscience remains as valid as it ever did. Every year numbers of journalists are intimidated, assaulted and killed in the exercise of their profession and protecting and supporting them is a vital aspect of freedom of expression activity. The point is that the levels of 'responsibility' that we might expect from an individual communicator, independent media and global corporate media differ from each other. Indeed, it could be suggested that there is a

ratio between the power of the communicator and the level of responsibility not to give offence that can reasonably be expected. The power held by the communicator is one element in the equation; another is the audience to which the communication is addressed.

Messages addressed to those in power do not automatically carry an obligation to exercise restraint, whatever those holding power may say. Laws that oblige citizens to respect their rulers are an abomination and a clear indication that those rulers do not deserve respect on the basis of their character and deeds. Political invective and satire are potent means to pursue change. The history of the political cartoon is an example of the principle of purposeful disrespect in action and this probably explains any discomfort that people from old established democracies feel when the validity of the cartoon as a means of conveying political messages seems to be put in question. The case is well made by Spiegelman (2006), himself a distinguished cartoonist. The largely unrepresentative system of government in Britain during the eighteenth and nineteenth centuries was subject to savage, defamatory and often scatological cartoons by the like of Gillray and Rowlandson. Cartoonists in Britain and other countries made genuine contributions to beneficial change by pointing out the abuses, hypocrisies and absurdities of those in power. As Morreall (2005, p.63) puts it:

> Political cartoons have been part of newspapers almost as long as there have been newspapers, and the rise of democracy in the eighteenth and nineteenth centuries was correlated with the rise of sophisticated political cartooning.

The advice of Confucius 'Tell the prince the truth, even if it offends him' is as valid today as it ever was, and it applies to potentially offensive forms such as the cartoon.

However, the case is altered when one considers messages addressed to broader audiences and directed at the beliefs or other distinguishing characteristics of other groups. This would particularly apply to the so-called 'hate speech', which is a direct threat to the rights of others. This is because hate speech first of all denies recognition of 'the inherent dignity' of all human beings and their 'equal and inalienable rights' as set out in the preamble to the Universal Declaration of Human Rights. In the second place it can threaten their more specific rights as set out in the Declaration. Speech or other communication that incites hatred, particularly on grounds of race and religion, and effectively threatens the rights of its victims is a criminal offence in the laws of a number of countries. The availability of law that is capable of offering redress for those who are the victims of derogatory communication that does not fall within legal definitions of hate speech is less obvious. Individuals can use the laws on defamation to contest and seek compensation for statements that damage their reputation. This is a difficult road to take because, amongst other things, it allows the author of an allegedly defamatory statement to attempt to show in court that the statement was justified, with possible further damage to reputation. Nevertheless, many of those who believe they have been defamed do make use of these laws.

There is obviously a logical argument that the concept of defamation should apply to statements that threaten the reputation and dignity of a group of people just as much as to statements made about an individual. It seems to be the case that systems of law generally do not easily accommodate the concept of group defamation. Here the Muslim protesters against the cartoons asked a valid question: if the law does not

seem to offer them redress, what is available to them but public demonstration? In turning to this they exercised another human right, that of peaceful assembly.

Universal Declaration of Human Rights, Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Here the important word is 'peaceful'. Human rights and the laws of nations do not permit riot, the destruction of property, assault on other people and the making of direct threats of violence including murder. The rule of law has at its very heart the specific purpose of protecting the peace of the community by denying personal revenge, duelling, feud and riot as responses to offence, whether that offence is verbal or physical. The law takes to itself the responsibility of dealing with the consequences of offence and in doing so creates a fundamental distinction between advanced and backward societies. Peaceful protest and campaigns to change the law are the only genuine remedies in cases where citizens feel that the law has failed to protect their rights.

If there are strict limits on the scope of responses to offence, we have to turn back to the responsibilities of those who might risk, or actually seek to give, offence: this means political and social commentators, and satirists such as cartoonists. If the law does not set clear limits on the types of statement that can be made about groups of people, are there sources of guidance is available to those who might feel that they have a valid point to make (which might prove offensive to a particular group)? There are. For example, the need for restraint in addressing the vulnerable is one that has been examined in the literature of comedy. Modern comedy, 'stand-up' in particular, can be savage and is explicitly intended to be disturbing. In theory no issue should be exempt from the attention of the comedian. However, even the most outrageous comedians do work within some generally unspoken limitations. This has been identified as the exercise of 'decorum'.

> Decorum can be defined as a decision about the form of expression which is publicly judged appropriate for a given setting and theme. (Palmer, 2005, p.80)

This could be seen as including a calculation of the offence that might be given by a particular humorous theme or style. The exercise of decorum applies particularly in everyday life, but a kind of licence that permits satirical humour to exceed the boundaries of normal decorum is accepted in the modern world. In venues and media such as theatres, nightclubs, magazines articles and cartoons, it is accepted that different standards apply.

Palmer (2005)'s argument is that in licensing satirical humour society recognises the existence of many different 'discourses' and stands back from the imposition of a single unified 'language'. In this way the contradictions and tensions of communal life are given recognition and, implicitly, the possibility of change accepted. In the first place this requires the 'permission' of the state, but it can be further argued that

the permission of those who might be objects of satire is also needed. By this it is not meant that all comedy should be checked and approved by those it might offend. Rather it means that whilst comedians can assume a broad social permission for their art, they should retain sensitivity to the feelings of those, particularly vulnerable groups, that they might be seen as addressing. Working this out the implications of this sensitivity in practice is problematic and the outcomes not consistent. For instance, the exercise of decorum by male comedians might now be taken to include the avoidance of gratuitous insult to women. At the same time, it might be accepted that after centuries of female subordination to the male, a female comedian might well exceed similar limits in her commentary on men. In doing so, she would at some level or other be working with the permission of men and, arguably, for the good of men. What this means is that for comedy to perform its licensed role in society, the exercise of decorum is required and the calculation of what that means in practice depends on some sense of permission. However, for that to be effective it does, in turn, depend on the assumption that any specific group will show its commitment to pluralistic values in society by extending at least elements of such permission. Thus in the end we return to the communal values of tolerance and understanding that inspire the concept of human rights and underlie belief in the significance of freedom of expression.

CONCLUSION

The role of librarians and other information professionals is to facilitate public access to information and ideas. This includes the products of the human imagination as well as those of scientific and philosophical enquiry. Comedy is thus just as much a concern of librarians as is the scientific literature. Even where comedy is the source of passionate dispute, as was the case with the Danish cartoons, the librarian still has a basic professional duty to assure that legally published material is available to those who might wish to consult it. Of course, there would be a big difference between keeping a copy of an offending document on file for free consultation and displaying it publicly on the walls of the library, or on its web pages. Somewhere between the two the librarian can strike a decent balance without either abandoning the principle of free access to information or gratuitously giving offence to either an individual or a group within the community.

If there is a problem it is in explaining the position that the library might take on such an issue, particularly to those whose sense of offence might extend from the originators of the statement (be it cartoon, or whatever) to an institution like a library that makes it available. The purpose of this article has been to open some of the relevant lines of argument that influence the librarian’s defence of freedom of expression and freedom of access to information. It is not really sufficient to say that the law permits it and that the principle of freedom of expression demands it. It is important at least to recognise the complex interrelation between the various human rights, of which freedom of expression is one. There is also a necessity to think clearly about the avoidance of harm and offence in balancing human rights with each other and to develop an awareness of how freedom of expression might work in society. This article only introduces such an approach. In the end it is the responsibility of professionals to debate these issues among themselves and come to informed and well-considered positions that they can present to their community.

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